STATE OF MICHIGAN

COURT OF APPEALS

LAWRENCE G. WAYBURN, MD, Plaintiff/Counter Defendant/-Appellant-Cross Appellee,	UNPUBLISHED March 4, 2014
v IRON COUNTY COMMUNITY HOSPITAL, INC., Defendant/Counter Plaintiff/Appellee-Cross Appellant.	No. 311652 Iron Circuit Court LC No. 07-003808-CK

LAWRENCE G. WAYBURN, MD, Plaintiff/Counter Defendant-Appellant,	
v IRON COUNTY COMMUNITY HOSPITAL, INC., Defendant/Counter Plaintiff-Appellee.	No. 315106 Iron Circuit Court LC No. 07-003808-CK

Before: HOEKSTRA, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

In this breach of contract action, plaintiff appeals by right in Docket No. 311652 the trial court's order striking his expert witness and its order granting defendant's motion for summary disposition. Defendant cross appeals the trial court's order striking its expert witness. In Docket No. 315106, plaintiff appeals by right the trial court's order granting offer of judgment sanctions

under MCR 2.405(D)[1] to defendant. Because we conclude that the trial court did not abuse its discretion by striking both parties' experts, and we conclude that there were no genuine issues of material fact and that the attorney fee award was proper, we affirm.

On August 25, 2003, plaintiff and defendant entered into a contract for plaintiff, a radiologist, to provide professional imaging services to defendant as an independent contractor. In addition to a guaranteed salary, plaintiff was to receive any net professional fees. At the beginning of the contract term defendant billed through Marquette Radiology Associates. Defendant's CFO, Glenn Dobson, testified that this billing arrangement made it very easy to calculate any net professional fees due to plaintiff.

Sometime following July 2004, defendant became a critical access hospital, which required billing on a single claim form. The global billing practice made it difficult to determine the professional and technical fees, and thus, difficult to calculate plaintiff's net professional fees. Dobson developed an estimate of collections to estimate the collected professional fees. He used a sample of vouchers to determine the average reimbursement rate, which was then applied to all collections to arrive at the estimated collected professional fees.

To support his damage claim under the contract, plaintiff engaged an expert witness, Donald Kramer, a registered and licensed certified public accountant (CPA). When deposed, Kramer testified that the collections of Marquette Radiology Associates during 2003 and 2004 were about 10 percent higher than Dobson's estimated collection rates in 2005 and 2006. He testified that this collection rate was more appropriate because it was "independent" of defendant. Application of that collection rate to the years 2005 and 2006 resulted in more than $300,000 additional collected professional fees. Defendant also engaged an expert, Jeffrey Mordaunt. When deposed, Mordaunt explained that he utilized Dobson's estimate in his calculations, but acknowledged Dobson's sample size was small and he would "like a bigger sample." However, he also utilized the general ledger and reconciled his expense numbers with it. His final opinion was that plaintiff was overpaid under the contract.

In addition to the parties' experts, the trial court appointed an independent expert, Andrew Davis, CPA. Davis prepared a report that was submitted to the parties and the trial court and made part of the trial court record. Davis performed calculations to determine the 2005 and 2006 income defendant collected on behalf of plaintiff and the costs of collection. Davis concluded that expenditures, including plaintiff's guaranteed pay, exceeded estimated collections for both 2005 and 2006. Neither party challenged the admissibility of Davis's report. Moreover, while given the opportunity, neither party deposed Davis regarding his findings.

However, the parties did challenge each other's experts. Both parties moved to strike and moved for summary disposition. The trial court held a hearing regarding the competing motions to strike and motions for summary disposition on May 30, 2012. After hearing arguments from both parties, the trial court issued its decisions on the record. The trial court struck both

[1] MCR 2.405(D) provides that costs may be imposed following the rejection of an offer of judgment when a verdict more favorable to the offeror is rendered.

plaintiff's and defendant's experts, finding there "was no basis for either expert's opinion." On the motions for summary disposition, the court found that "based on Mr. Davis's analysis and report—there's no material issue of fact" regarding whether plaintiff was entitled to damages because Davis concluded that plaintiff was overpaid under the contract. The court subsequently entered an order granting defendant's motion for summary disposition and entered a judgment against plaintiff in the amount of $35,398 plus interest. The trial court also granted defendant's motion for costs pursuant to an earlier offer of judgment under MCR 2.405.

On appeal, plaintiff first argues that the trial court should have admitted Kramer's expert testimony because it was based on the best available evidence.

We review the admission or exclusion of expert testimony for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76-78, 684 NW2d 296 (2004). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

The trial court has an "obligation . . . to ensure that any expert testimony admitted at trial is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). Admission of expert testimony is controlled by MRE 702 which provides as follows:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

"MRE 702 mandates a searching inquiry" of both the underlying data and the application of expertise to the data. *Gilbert*, 470 Mich at 782. The proponent of the expert "must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology." *Id*. Although there is a danger in focusing solely "on the data underlying expert opinion," that focus is the first step in evaluating expert testimony. *Id.* at 783. Where the data is unsound, the opinion "which an expert extrapolates from those data" is also necessarily unsound. *Id*.

In this case, the trial court struck plaintiff's expert because it concluded that the expert was "unreliable based on the data [he] used to formulate [his opinion]." Neither the trial court nor the parties raise any concerns regarding the qualifications of the experts.

On appeal, plaintiff does not specifically challenge the trial court's conclusion that Kramer's opinion was based on insufficient facts and data. Rather, plaintiff's statement of the issue on appeal states that the trial court abused its discretion by striking Kramer because Kramer "was forced to rely on the best available evidence" due to defendant's "failure to produce underlying data." We find this argument unavailing.

We note that plaintiff does not assert that the missing information was impossible to obtain, but merely that his efforts to obtain it were frustrated. Plaintiff complains that "2,000

documents" were delivered to him; however, the size of the record is not a defense to unsupported expert testimony. Further, while the additional documentation was provided after Kramer was deposed, it was provided before the close of discovery and before the hearing on the motions to strike. Thus, it was possible for plaintiff to bolster the basis for Kramer's opinion with the additional documentation provided, but for whatever reason, no further action was taken. In regard to the information that was allegedly never disclosed to plaintiff, review of the record demonstrates that plaintiff did not move to compel additional discovery. Thus, plaintiff cannot now complain about the fact that defendant failed to disclose documentation. See *State Treasurer v Sheko*, 218 Mich App 185, 189; 553 NW2d 654 (1996) (holding that the defendant's failure to file a motion to compel the plaintiff to respond to his interrogatories waived the issue on appeal absent manifest injustice).

Moreover, we agree with the trial court that the facts and data relied upon by plaintiff's expert was insufficient to provide a proper basis for admission of the expert's testimony under MRE 702. On several occasions in his deposition Kramer noted the lack of information available to him. In particular, Kramer testified that he was missing the general ledger for the income accounts for the years 2005 and 2006, information regarding the method for determining the percentage of collections for the different insurance companies billed, backup documentation for the charges from Marquette General Hospital, and accounts payable for 2003 and 2004. Later he noted that he "couldn't render a complete opinion on 2005 and 2006" and also "the problem is that we don't have any evidence one way or the other to prove or disprove it, or at least any substantial evidence." The lack of information led Kramer to use the average collection amounts from "the prior year, from an independent third party, which would appear to be a reasonable basis for allocating the revenue." Accordingly, we conclude that Kramer's own testimony regarding the lack of reliable data during his deposition supports the trial court's conclusion. Thus, we conclude that the trial court did not abuse its discretion in finding that the data relied upon by the experts was insufficient to form the foundation of an admissible opinion and by striking plaintiff's expert.

Plaintiff next argues that the motion for summary disposition was improper because genuine issues of fact remain regarding damages. "A trial court's grant of summary disposition is reviewed de novo." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). The motion for summary disposition tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). We consider "the pleadings, affidavits, depositions, admissions, and other admissible evidence in the light most favorable to the nonmoving party." *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 366; 817 NW2d 504 (2012). To survive the motion for summary disposition, plaintiff may "not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The "mere possibility that the claim might be supported by evidence" is insufficient to survive a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

Kramer's testimony was the only expert testimony submitted by plaintiff. While plaintiff argues his own testimony about his damages creates a question of fact, plaintiff only speculates about his alleged damages, and does not testify with any specificity about what the damages would be, how he arrived at that conclusion, or the factual foundation for his belief. He testified

only to the "suspicion" certain charges "might be" either "too high" or "much higher" than desired. These speculations lack the specificity required to survive the motion for summary disposition. Moreover, because the trial court struck both parties' experts, Davis's conclusion that plaintiff was actually overpaid under the contract was unrefuted. Thus, there was no genuine issue of material fact regarding damages because the only evidence before the trial court demonstrated that plaintiff did not suffer any damages. Accordingly, the trial court did not err by granting summary disposition in favor of defendant.

Defendant argues on cross-appeal that his expert must be admitted if this Court admits Kramer's testimony. Because we have held Kramer's testimony was properly excluded, there is no need to address this issue. Similarly, because we affirm the trial court's holdings both excluding the expert testimony and the grant of summary disposition, the sanctions under MCR 2.405 are likewise affirmed.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Riordan